Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services	)	CC Docket No. 92-115

PETITION FOR RECONSIDERATION AND CLARIFICATION

GTE Service Corporation and its
telephone and wireless companies

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December 19, 1994

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SUMMARY

In an undertaking as daunting as the rewrite of Part 22 of the Commission's rules, it is not surprising that some of the changes made had an unintended effect on carriers and their customers. As a result of these changes, GTE believes the Commission may have changed the operation of rules it did not mean to change, or may have left carriers uncertain how some rules will apply. If left unchanged, the new rules could have a profound affect on GTE's rights and obligations.

By this petition, therefore, GTE respectfully requests that the Commission reconsider or clarify five of the new rule sections under Part 22. In particular, GTE asks that the Commission: (1) reconsider its decision to eliminate old rule section 22.903(e) which provided, *inter alia*, that a cell located in one market may not be used in determining the Cellular Geographic Service Area ("CGSA") for a different, unserved market unless the cell is licensed for both markets; (2) clarify, with respect to new section 22.137, that a change in ownership from less than 50% to 50% or more ownership constitutes a transfer or control requiring application and approval; (3) clarify, with respect to new section 22.929(b), that technical information is required to be filed on FCC Form 600, Schedule C, even though Schedule C does not appear to be designed for this purpose; (4) reconsider its decision in adopting section 22.936 to eliminate the requirement from old section 22.943(b)(1) that license applicants withdrawing their applications prior to the Initial Decision stage in cellular renewal proceedings certify that neither the applicant nor its principals received any money or other

consideration in exchange for withdrawing the application; and (5) reconsider its decision in adopting new section 22.108 to require license applicants to disclose all parties in interest, rather than parties in interest that are engaged in the Public Mobile Services as was required under old rule section 22.13(a)(1).

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PETITION FOR RECONSIDERATION AND CLARIFICATION

GTE Service Corporation ("GTE") on behalf of its telephone and wireless companies pursuant to section 1.429 of the Commission's Rules[1] hereby requests reconsideration and clarification of the Federal Communications Commission's ("FCC" or "Commission") *Report and Order* in the above-captioned proceeding to the extent described herein.[2]

I. BACKGROUND

In 1992, the FCC issued a *Notice of Proposed Rulemaking* proposing to revise Part 22 of the Commission's Rules governing the Public Mobile Services.[3] There, the Commission proposed to revise Part 22 of its rules "in order to make

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1 47 C.F.R. § 1.429.

2 Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, CC Docket No. 92-115; Amendment of Part 22 of the Commission's Rules to Delete Section 22.119 and Permit the Concurrent Use of Transmitters in Common Carrier and Non-common Carrier Service, CC Docket No. 94-46, RM 8367; Amendment of Part 22 of the Commission's Rules Pertaining to Power Limits for Paging Stations Operating in the 931 MHz Band in the Public Land Mobile Service, CC Docket No. 93-116, *Report and Order* (released September 9, 1994), 59 Fed.Reg. 59,502 (November 17, 1994) (hereinafter "*Part 22 Rewrite Order*").

3 Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, *Notice of Proposed Rulemaking*, CC Docket No. 92-115, 7 FCC Rcd 3658 (1992) (hereinafter "*Part 22 NPRM*").

[them] easier to understand, to eliminate outdated rules and unnecessary information collection requirements, to streamline licensing procedures and to allow licensees greater flexibility in providing service to the public."[4] In particular, the Commission stated that a revision of Part 22 was needed due to a number of factors, including: the need to ensure that the rules are consistent and applicable after numerous amendments; significant changes that have made some rules obsolete and unnecessary; and technological changes.[5] On August 2, 1994, the Commission adopted many of the changes proposed in the *Part 22 NPRM*. In that order, the Commission revised Part 22 in its entirety.

II. DISCUSSION

GTE generally applauds the Commission's efforts to update, simplify and organize Part 22 of its Rules. For the most part, GTE believes that the Commission accomplished its goals in making the Part 22 revisions. However, it is not surprising, in any undertaking as daunting as the Part 22 rewrite, that some changes made had an unintended effect on carriers and their customers. GTE believes that many, if not all, of these changes were made by the Commission without fully realizing the adverse effect such changes would have on carriers and their customers.

By this petition, GTE respectfully requests that the Commission reconsider or clarify some of the Part 22 amendments adopted in the *Part 22*

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[4] *Id.* at 3658.

[5] *Id.*

Rewrite Order. Specifically, GTE requests that the Commission: (1) reconsider its decision to eliminate old rule section 22.903(e) which provided, *inter alia*, that a cell located in one market may not be used in determining the Cellular Geographic Service Area ("CGSA") for a different, unserved market unless the cell is licensed for both markets; (2) clarify, with respect to new section 22.137, that a change in ownership from less than 50% to 50% or more ownership constitutes a transfer or control requiring application and approval; (3) clarify, with respect to new section 22.929(b), that technical information is required to be filed on FCC Form 600, Schedule C, even though Schedule C does not appear to be designed for this purpose; (4) reconsider its decision in adopting section 22.936 to eliminate the requirement from old section 22.943(b)(1) that license applicants withdrawing their applications prior to the Initial Decision stage in cellular renewal proceedings certify that neither the applicant nor its principals received any money or other consideration in exchange for withdrawing the application; and (5) reconsider its decision in adopting new section 22.108 to require license applicants to disclose all parties in interest, rather than parties in interest that are engaged in the Public Mobile Services as was required under old rule section 22.13(a)(1).

In the *Part 22 NPRM*, the Commission dealt with proposed rule changes differently depending on the nature of the change. Thus, the "more significant" proposals were discussed briefly in the text of the order.[6] Appendix A, entitled

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[6] *Id.* at 3658 (para. 7) (the referenced discussion is at 3658-3661).

"Proposed Rules Discussion," deals with "major rule revisions." In the preamble to that section, the Commission states that "[r]ules that are changed only in format or style, rules that are only reworded or retitled, rules with only minor or non-substantive changes, and rules we propose to delete because they are unnecessary are not discussed in this appendix."[7] Appendix B lists the proposed new Part 22.[8] Appendix C cross-references old sections with new sections and includes notations that certain sections or subsections are to be omitted.[9] The *Part 22 Rewrite Order* is configured in the same manner.[10]

None of the specific changes GTE seeks to have reconsidered or clarified were discussed by the Commission in either the text or Appendix A of the *Part 22 NPRM* or the *Part 22 Rewrite Order*. Moreover, none of the omissions were noted in the cross-reference Appendix of either item. Thus, it would appear that these changes were inadvertent.[11] These rule changes involve important

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7 *Id.*, Appendix A, at 3664.

8 *Id.*, Appendix B, at 3676-3751.

9 *Id.*, Appendix C, at 3752-3754.

10 The preamble to Appendix A is worded somewhat differently in the *Part 22 Rewrite Order*. There, the Commission states that "in this appendix, we summarize the record and discuss the non-controversial but substantive rule revisions, including those involving procedural changes, and some of the rule revisions involving only editorial changes." *Part 22 Rewrite Order*, Appendix A, at A-1.

11 GTE believes that failure to make the changes that GTE suggests would constitute a violation of Commission Rules and of the Administrative Procedure Act ("APA"). Commission rules pertaining to rulemaking proceedings state that "[t]he Commission will consider all relevant comments and material of record before taking final action in a rulemaking proceeding and will issue a decision incorporating its finding *and a brief statement of the reasons therefor*." 47 C.F.R. § 1.425 (emphasis added). Similarly, the Administrative Procedure Act requires that "[a]fter consideration of the relevant matter presented, the agency shall incorporate in the rules adopted *a concise general statement of their basis and purpose*." 5 U.S.C. § 553(c) (emphasis added).

substantive rights. GTE submits that reconsideration or clarification as specified above and discussed herein will serve the public interest.

A. The Commission Should Reconsider Removal of the Provision that Explicitly Provided Cellular Carriers the Option of Using a Single Cell to Serve Multiple Markets – Old Section 22.903(e)

The new rules adopted in the *Part 22 Rewrite Order* omitted old section 22.903(e). That section provided:

> A single cell may be used to serve multiple markets. Nevertheless, a cell located in one market may not be used in determining the CGSA for a different MSA, RSA, or unserved area market unless the cell is licensed for both markets.[12]

This rule section confirmed cellular carriers' option of using a single cell to serve an area located in more than one market. At the same time, the old rule enabled carriers to obtain FCC protection of the cell's total service area within the Cellular Geographic Service Areas ("CGSAs") – including all markets served by the carrier – by licensing the cell in all markets covered by that cell.[13] Thus, under the old rule, a carrier could choose to invest in and construct a single cell at a

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The sum of these two requirements is that an administrative agency must engage in reasoned decisionmaking and, at minimum, briefly explain the reasons for the rules it adopts or eliminates. Rules not supported by reasoned decisionmaking are arbitrary and capricious and subject to being set aside by a reviewing court. 5 U.S.C. § 706(2)(a). *See also Motor Vehicle Manufacturing Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983) (there the Supreme Court imposed on agencies a duty to explain the basis and purpose of rules in order to avoid a determination that the agency's decision to adopt or rescind rules is arbitrary and capricious).

[12] 47 C.F.R § 22.903(e) (1993).

[13] The CGSA is the area within which cellular systems are entitled to FCC protection. 47 C.F.R. § 22.903 (1993) (old rule); 47 C.F.R. § 22.911 (1994) (new rule). FCC rules protect the CGSA from co-channel and adjacent channel interference and from capture of subscriber traffic by adjacent systems on the same channel block.

location from which it was possible to immediately expand cellular coverage to an area outside the market in which the cell was actually located. The old rule language therefore provided carriers an important means to rapidly and economically expand or enhance cellular coverage in several markets -- which are often operated as one seamless wide-area system -- while still affording the carrier explicit FCC protection for the entire cellular service area in all markets served by the cell.

Without this protection, the area served by the cell outside the original market could mistakenly appear to others to be unserved. As such, omission of the language in previous section 22.903(e) could result in uncertainty regarding a carrier's rights in a particular area and ultimately lead to costly and unnecessary litigation. Accordingly, GTE believes that previous rule 22.903(e) served the public interest and should be restored.

GTE believes that the above-described implications resulting from the elimination of old section 22.903(e) may have been unintended. The omission of section 22.903(e) is not discussed in either the text or Appendix A of the NPRM. New section 22.911, which replaced old section 22.903, is set forth in Appendix B, but there is no explanation or even mention of the omission of the language in old section 22.903(e). Likewise, there is no reference in Appendix C that this subsection was omitted. The omission of old section 22.903(e) is also not discussed in the *Part 22 Rewrite Order.* While a brief discussion of new section

22.911 appears in Appendix A, there is no mention of the omission of the old subsection.[14]

While the Commission is not required to give notice of, and state reasons for, purely procedural or inconsequential changes in its rules, it must do so when a substantive right is at issue.[15] As GTE explained above, the removal of the language in old section 22.903(e) would take an important substantive right away from cellular carriers. GTE therefore asks that the Commission reconsider its previous decision, and restore the omitted provisions of old section 22.903(e) in the text of the new rules.

B. The Commission Should Clarify that a Change in Ownership from Less Than 50 Percent to 50 Percent or More is a Transfer or Change of Control

New rule section 22.137 no longer contains the 50% test utilized for determining whether a transaction constituted a transfer of control, which was formerly set forth in Section 22.39(a)(1). GTE presumes that this omission was unintentional and asks the Commission to clarify that, under the new rule, a change in ownership from less than 50 percent to 50 percent or greater constitutes a transfer or change of control giving rise to a duty to file an application for approval pursuant to section 22.137(a).

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[14] *Part 22 Rewrite Order*, Appendix A, at A-40-41. Like the NPRM, the order sets forth the new rule in Appendix B, but does not mention the omission of the old subsection in cross-reference Appendix C.

[15] *See* 47 C.F.R. § 1.412(b) (Commission rules do not require notice -- or, presumably, reasoned analysis -- be given for rule changes pertaining solely to Commission organization, procedure, or practice; interpretive rules; and general statements of policy).

New section 22.137(a) states that "[t]he assignor or transferor must file an application for approval of assignment or transfer of control (FCC Form 490)." Unlike its predecessor, however, the section does not give any indication as to when a transfer of control is deemed to have taken place. Specifically, the new section omits language that states that a change of ownership from less than 50 percent to 50 percent or greater constitutes a transfer of control.

GTE submits that the omitted language was important and should be restored to new section 22.137(a). Even where neither *de facto* nor *de jure* control changed (e.g., when 50% of non-voting equity changed hands but the controlling general partner of shareholder remained unchanged), the 50% rule effectively required a transfer of control application to be filed. Without this language, uncertainty will exist as to whether the 50% test remains operative. Thus, carriers will no longer know whether a transfer of control has occurred in the eyes of the Commission and will not, in all cases, know when applications for authorization are required.

GTE presumes that this omission was unintentional, as Appendix A of the *Part 22 Rewrite Order* states that: "[t]his rule [Section 22.137] tracks old § 22.39."[16] Further, in several instances where Section 22.137 diverged from its predecessor, the Commission did discuss those changes.[17] GTE respectfully requests that the Commission correct the inadvertent omission and clarify that

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[16] *Part 22 Rewrite Order*, Appendix A, at A-17.

[17] *Id.*

the 50 percent rule still applies in assessing whether a change of control has occurred for purposes of section 22.137.

C. The Commission Should Clarify Whether Carriers Should File Technical Information in Support of Cellular Authorization Applications on FCC Form 600, Schedule C

New rule 22.929 requires cellular carriers to file certain supplementary information along with applications for authorization in the Cellular Radiotelephone Service. This information includes administrative information, technical information, and maps.[18] The supplemental information is, according to the rule, required by FCC Form 600, Schedule C.[19]

In reviewing the new rules, as amended, GTE discovered that FCC Form 600, Schedule C has not been designed to accommodate the filing of the technical information specified under new section 22.929(b). GTE therefore requests that the Commission clarify the following:

(1) Whether the Commission intends for cellular carriers to file the technical information specified in new section 22.929(b);

(2) If so, whether the Commission intends for this information to be included on FCC Form 600, Schedule C or on some other schedule, or exhibit; and

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[18] 47 C.F.R. § 22.929.

[19] Although the rule, as adopted specified FCC form 401, *Part 22 Rewrite Order*, Appendix B, at B-78, § 22.929(a-c), the Commission has since issued an *Erratum* changing the rule to specify Form 600. Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GN Docket No. 93-252; Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 Mhz Frequency Band, PR Docket No. 93-144; Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 Mhz Band Allotted to the Specialized Mobile Radio Pool, PR Docket No. 89-553, *Erratum*, (released November 30, 1994) at 13-14.

(3) The manner in which cellular carriers are to include the required information on Schedule C or some other exhibit.

D. Applicants Withdrawing Prior to the Initial Decision Stage of Cellular Renewal Proceedings Should Have to Certify that Neither the Applicant nor its Principals Received Any Money or Other Consideration in Exchange for Withdrawing the Application

In new rule 22.936, the provisions of old rule 22.943 appear to have been combined, reorganized and simplified. However, in combining certain provisions formerly contained in old subsections 22.943(b) and 22.943(c), the Commission inadvertently removed a strong deterrent against speculators manipulating the renewal application process. The old rule, by prohibiting any compensation to renewal challengers prior to an Initial Decision, prevented entities from filing frivolous applications for the purpose of extorting money from the incumbent applicant.

This rule was derived from a similar rule adopted by the Commission in the context of broadcast license renewals.[20] In extending this policy to cellular renewal applications, the Commission stated that "[t]he conduct of applicants speculating in authorizations and litigious petitioners delaying the licensing process in cellular radio are undesirable and inimical to the public interest."[21]

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[20] Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process, *First Report and Order*, 4 FCC Rcd. 4780 (1989), *recon. denied*, 5 FCC Rcd. 3902 (1990).

[21] Amendment of Part 22 of the Commission's Rules Relating to License Renewals in the Domestic Public Cellular Radio Telecommunications Service, *Report and Order*, CC Docket No. 90-358, 7 FCC Rcd 719, 725 (1991).

Speculative filings not only create costs to carriers which must then be passed on to subscribers, but also needlessly clog the Commission's hearing mechanisms. By requiring challengers to proceed through the entire hearing process before receiving any compensation, the rule provision eliminated in the *Part 22 Rewrite Order* ensured only serious and sincere renewal challenges would come forward.

New rule 22.937 retains the prohibition against receiving payments in excess of legitimate and prudent expenses. However, as written, it would nonetheless permit insincere applicants to file speculative or frivolous applications with no attendant cost. The incumbent licensee will always have a strong incentive to pay their expenses in return for the elimination of the "cloud" which the challenge has placed on its license. Thus, under new rule 22.936 as written, cellular license renewal applicants, the Commission, and the public have lost a strong deterrant against frivolous and abusive filings.

It appears to GTE that the Commission intended the revisions to the provisions of old rule 22.943 to be only procedural or inconsequential in nature. Thus, item 38 of the FCC's Erratum on the Part 22 Rewrite, released September 21, 1994, in correcting Appendix A's omission of discussion of new rule 22.236, adds discussion of the new rule which states that "[t]his new section contains the provisions of old § 22.943. There is no substantive change." Moreover, the Commission did not discuss this rule modification in either the text or Appendix A of the *Part 22 NPRM* or the *Part 22 Rewrite Order*.

For these reasons, GTE believes that the new rule does not serve the public interest. Accordingly, GTE requests the Commission reconsider its decision enacting new rule section 22.936 by restoring the provision from old rule 22.943(b)(1) that requires challenging applicants in renewal proceedings seeking to withdraw or dismiss their applications prior to the Initial Decision stage to certify that no money or other consideration has been or will be received by them or their principals in exchange for withdrawal of their applications.

E. Applications Under New Section 22.108 Should Only Be Required to Disclose Parties in Interest that Are Engaged in the Public Mobile Services

In crafting new section 22.108 to replace old section 22.13, the Commission omitted a key phrase that defined the scope of the disclosure requirement relating to real parties in interest. Thus, while the old rule required applicants only to disclose "the real party or parties in interest, *that are engaged in the Public Mobile Services,*"[22] new section 22.108 omits the qualifying phrase highlighted above. This omission may be interpreted to substantially increase the scope of disclosure required by new rule 22.108 with respect to "real parties in interest." GTE requests that the Commission restore the phrase "that are engaged in the Public Mobile Services" in the text of the new section.

Under old section 22.13(a)(1), it was clear that applicants were only required to disclose parties in interest that hold an interest in Public Mobile Services. The Commission previously noted that, "it does not demand a list of all

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[22] 47 C.F.R. § 22.13(a)(1) (1993) (emphasis added).

entities financially related to the [ ] applicant (all subsidiaries of the corporate parent, e.g.)."[23] Rather, the Commission has repeatedly stated that applicants were only required to "disclose those subsidiaries and affiliates which have financial interests in Part 22 licensees, permits or applicants."[24]

Unless the old language is restored, new rule 22.108 could appear to require applicants to disclose all parties in interest each time an application or amendment thereto is filed. Such a requirement would place a huge administrative burden on applicants and the Commission. Applicants would be required to compile and submit more extensive ownership information in all affected applications. The new rule could even be interpreted so broadly as to require applicants to report information about non-controlling interests held by applicants' subsidiaries, affiliates, officers, directors and key managers that have no relation to the communications services in the subject application. Furthermore, if the disclosure requirement is expanded, numerous amendments will need to be filed in order to keep ownership information current. These amendments will need to be reviewed by the Commission.

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[23] Real Party in Interest Disclosure Requirements in the Public Mobile Radio Service, *Public Notice,* Mimeo 1060, 52 R.R.2d 1053 (1982).

[24] Application of Jacksonville Cellular Telephone Corp. For a Construction Permit to Establish a New Cellular System to Operate on Frequency Block A in the Domestic Public Cellular Radio Telecommunications Service to Serve the Jacksonville, North Carolina, Metropolitan Statistical Area, File No. 83000-CL-P-258-A-86, DA 87-1505, 64 R.R.2d 426, 428 (1987). *See also* Application of Canaan Industries, Inc. For a New System in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block A for the Vineland-Millville-Bridgeton, New Jersey MSA, File No. 59467-CL-P-228-A-86, DA 87-492, 62 R.R.2d 1561, 1563 (1987).

It is clear to GTE that the Commission did not intend new section 22.108 to have this affect. First, in adopting the new section, the Commission stated that "[t]he intent of the NPRM was to propose the retention of the substance of § 22.13(a)(1) as it existed prior to the NPRM with respect to the disclosure of real parties in interest."[25] The Commission also states that "[w]e have adopted the substantive provisions of old § 22.13(a)(1) concerning the disclosure of information concerning real parties in interest."[26]

Moreover, broadening the disclosure requirement does not appear intentional because an expanded requirement would be contrary to the Commission's stated purpose for reviewing Part 22 of its rules. In both the *Part 22 NPRM* and the *Part 22 Rewrite Order*, the Commission noted that the purpose of its overhaul of Part 22 was, in part, to "eliminate unnecessary information collection requirements" and to "streamline licensing procedures."[27] New section 22.108, however, as written, could be interpreted to create a new, more burdensome, requirement without explaining why such a requirement might be necessary.[28] Rather than streamlining licensing procedures, the new

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[25] *Part 22 Rewrite Order*, Appendix A, at A-9.

[26] *Id.*

[27] *Part 22 NPRM* at 3658, *Part 22 Rewrite Order* at 3.

[28] If the Commission did intend to modify the disclosure of interest requirement, it did not do so in a manner consistent with Commission rules or the Administrative Procedure Act. As noted above, the Commission did not provide any mention of a change from the previous rule or any reason for the change. As discussed previously, the adoption of the new rule contravenes section 1.425 of the Commission's Rules and section 553(c) of the APA. *See* n.11, *supra*.

language would make licensing even more onerous. It is unlikely that the Commission intended this effect.

For these reasons, GTE respectfully requests that the Commission reconsider the modification made in the language of old rule section 22.13(a)(1) and restore the phrase "that are engaged in the Public Mobile Services" to section 22.108 of new Part 22 defining the scope of an applicant's duty to disclose parties in interest.

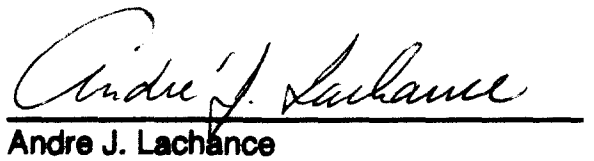
III. CONCLUSION

For the reasons stated above, GTE respectfully requests that the Commission: (1) reconsider its decision to eliminate old rule section 22.903(e) which provided, *inter alia*, that a cell located in one market may not be used in determining the Cellular Geographic Service Area ("CGSA") for a different, unserved market unless the cell is licensed for both markets; (2) clarify, with respect to new section 22.137, that a change in ownership from less than 50% to 50% or more ownership constitutes a transfer or control requiring application and approval; (3) clarify, with respect to new section 22.929(b), that technical information is required to be filed on FCC Form 600, Schedule C, even though Schedule C does not appear to be designed for this purpose; (4) reconsider its decision in adopting section 22.936 to eliminate the requirement from old section 22.943(b)(1) that license applicants withdrawing their applications prior to the Initial Decision stage in cellular renewal proceedings certify that neither the applicant nor its principals received any money or other consideration in exchange for withdrawing the application; and (5) reconsider its decision in

adopting new section 22.108 to require license applicants to disclose all parties in interest, rather than parties in interest that are engaged in the Public Mobile Services as was required under old rule section 22.13(a)(1).

Respectfully submitted,

GTE Service Corporation and its telephone and wireless companies



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December 19, 1994

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Certificate of Service

I, Judy R. Quinlan, hereby certify that copies of the foregoing "Petition for Reconsideration and Clarification" have been mailed by first class United States mail, postage prepaid, on the 19th day of December, 1994 to all parties of record.

Judy R. Quinlan

Judy R. Quinlan